REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CONSTITUTIONAL PETITION NO. 2 OF 2011

IN THE MATTER OF AN APPLICATION UNDER ARTICLE 22(1) OF THE CONSTITUTION

FRANCIS JAMES NDEGWA……APPLICANT

VERSUS

TETU DAIRY CO-OP. SOCIETY LTD.....RESPONDENT

JUDGMENT

The petitioner invoked **article 22(1)** of the **Constitution** and moved this court by way of a motion dated 3rd October, 2011 seeking four prayers the principal of which is stated in the following terms:-

> ***"3. That the warrant of arrest be dismissed and/or quashed for reasons of being oppressive contrary to the Constitution, punitive and in contradiction of fundamental rights and freedom of the applicant herein the said warrant of arrest has been issued in respect of Co-operative Tribunal shown hereunder. The Kenya Co-operative Tribunal Case No. 209 of 2006. Tetu Dairy Co-operative Society versus Francis James Ndegwa."***

If I am able to decipher what the applicant means, I understand him to be seeking the quashing of a warrant of arrest issued against him in the Co-operative Tribunal Case No. 209 of 2006 between him and Tetu dairy Co-operative Society Ltd, the respondent herein, on the basis that it contravenes his fundamental rights and freedom; I suppose this is the reason he has invoked **article 22 (1)** of the Constitution that guarantees every person the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.

The application is supported by his own affidavit sworn also on the 3rd October, 2011.

According to the applicant, he was sued in the Co-operative Tribunal which ultimately entered judgment against him for the sum claimed. In execution of the decree arising from the judgment, the decree-holder obtained a warrant of arrest from the Tribunal to have the applicant arrested and taken to court, apparently to show cause why he should not be committed to civil jail.

Exhibited to his affidavit is a copy of the warrant of arrest in execution of the judgment; it shows the applicant was adjudged by the Tribunal to pay the respondent who is the decree-holder the sum of Kshs 1,230,495/=. The warrant was addressed to the Officer in Charge, Nyeri Police Station ordering him to arrest the applicant and bring him to court unless he paid the decretal sum.

The applicant's case is that the case against him and several other people he was sued with but in separate cases arose as a result of being surcharged apparently for the respondent's money which was

misappropriated while he was its chairman. According to him, the inquiry which was conducted on the loss of the money implicated neither him nor members of his committee who were also sued in the same Tribunal. The applicant is aggrieved that though he was surcharged, **section 58** of the **Co-operative Societies Act** under which the inquiry was conducted does not authorise the Commissioner of Co-operatives to surcharge anybody. He swore that even the inquiry report itself did not recommend the surcharging of the applicant and his committee members.

The applicant also contested the Constitutionality of the Tribunal saying that it was not constituted in accordance with the Constitution and therefore did not have any legal mandate to issue the warrant of arrest against him. He urged that he is entitled to a fair hearing and in this regard he invoked **article 25(c)** and **50 (d)** of the Constitution. The warrant of arrest, according to the applicant, contravenes his fundamental rights and freedom as set out in the Constitution.

In response to the application, the respondent's Chairman, Francis Kamweru Wamugunda, swore that the respondent was never served with the applicant's application but had to get copies of the pleadings from the court; amongst the pleadings he retrieved were an Amended Originating Motion dated 10th October, 2011, a copy of a Notice of Motion dated 18th January, 2013 and an amended plaint attached to the Notice of Motion filed in court on 21st January, 2011.

The respondent, nevertheless swore that apart from what the applicant had filed in his application, he had also filed several other cases relating to the same issue; these are, Judicial Review Case No. 42 of 2006; Nyeri High Court Appeal No. 74 of 2008; High Court Miscellaneous Application No. 36 of 2006; High Court Case No. 167 of 2009; Civil Appeal No. 88 of 2009 and Civil appeal No. 36 of 2010.

In Nyeri High Court Appeal No. 74 of 2008, which is just one of the several proceedings that the applicant took against the judgment in the Co-operative Tribunal, the appellant appealed against judgment; apart from the appeal, he also filed an application for stay of execution of that judgment. This court (Makhandia, J) dismissed the application for stay on 29th January, 2009.

The respondent was of the view that, in the face of all these proceedings taken by the applicant, his current application before court is frivolous, vexatious and an abuse of the process of the Court and ought to be dismissed.

When this matter came up for hearing, the applicant reiterated his contentions in the affidavit in support of the application; Mr Gitonga for the respondent on the other hand, reiterated his client's depositions in the affidavit in opposition to the application but added that the decree out of which the impugned warrant was issued was partly executed at the time of hearing of the applicant's application.

Counsel submitted that the applicant had been arrested and remanded in execution of the decree but he had been released upon parties having entered a consent to the effect that the applicant would deposit a sum of Kshs 750,000/= with the respondent or his advocate and thereafter pay the balance by way of monthly instalments of Kshs 100,000/= till payment in full.

If the applicant was dissatisfied with the judgment and the decree, so counsel submitted, the only cause open to him was to appeal under **section 81** of the **Co-operative Societies Act**. The applicant, according to counsel, did not appeal and by coming to court on the pretext of infringement of his rights the applicant was effectively trying to appeal through 'back door'.

Counsel also submitted that the applicant had sought to stay the proceedings in the Co-operative Tribunal vide High Court Case No. 78 of 2008 but the application was dismissed; he applied for stay orders in Civil Case No 167 of 2009 but again the application was dismissed. Not satisfied, the applicant appealed to the Court of Appeal in Civil Appeal No. 88 of 2009, the appeal was again dismissed. He filed a judicial review no 42 of 2006 which, according to counsel, has never been completed. Counsel urged that all these proceedings go to show that the applicant has grossly abused the court process. He urged the application to be dismissed and the order staying execution discharged.

The record shows that apart from the notice of motion dated 3rd October, 2011 which initiated the proceedings herein, the applicant filed several other applications subsequently; for instance, on 10th October, 2011, just a week after he filed the Motion, he filed an "amended Originating Notice of Motion" without any leave to that effect and without any Originating Notice of Motion having been filed in the first place. On 21st January, 2013 he filed another motion seeking to amend the motion dated 3rd October, 2011. On the same date, he filed "an amended plaint" against the respondent in what is for all intents and purposes a constitutional petition. On 24th February, 2015 he filed an application to strike out the respondent's replying affidavit responding to his motion for remedies for what he thought was the respondent's breach of his constitutional rights.

The temptation to lose focus in the midst of all these applications and pleadings was real and inorder to avoid that direction which only would have served to cloud the main dispute between the parties I directed that except for the application dated 3rd October, 2011 all other applications to be dispensed with and parties proceed with the hearing of what appeared to me to be the main petition in the applicant's motion dated 3rd October, 2011. In the meantime, the order for stay granted to the applicant on 29th June, 2012 was to remain in force pending the hearing and determination of this petition. In taking this course I found cover under **rule 3(8)** of the **Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013** (otherwise called **Mutunga Rules**) which provides that nothing in those rules shall limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court.

It is against this background that parties proceeded and argued their case on 30th October, 2015.

I have considered the relevant pleadings, affidavits and submissions by the applicant who represented himself and counsel for the respondent. Before proceeding to the merits of the applicant's motion, I have to say something about procedure in applications in which **article 22** of the Constitution is invoked.

Rule 3 the **Mutunga Rules** says that any proceedings taken under **article 22** of the **Constitution** are subject to those rules with the overriding objective to facilitate access to justice for all persons as provided for under **article 48** of the **Constitution**. (See **rule 3(2));** having invoked **article 22** of the **Constitution**, the applicant's application was therefore subject to the Mutunga Rules.

Now, **rule 10** of those rules prescribes the manner of approaching court whenever an applicant alleges a denial, violation, infringement or threatened infringement of any right or fundamental freedom; it says that the application has to be by way of a petition as set out in Form A in the Schedule, of course, with such alterations as may be necessary.

The applicant did not file a petition as prescribed by the rules but rather filed a notice of motion in what clearly appears to be in breach of **rule 10** of the **Mutunga Rules**; however, the applicant was unrepresented and I do not think this misstep in procedure should be taken against him; in any event, under **rule 3(7)** of the same Mutunga Rules, this Court is prodded to pursue justice for all persons including those that are poor, illiterate, uninformed, unrepresented and persons with disabilities. I am not certain whether the applicant has any disability but his application is in the nature of a person who could as well fall into all or any of the other category of persons contemplated under **rule 3(7)** of the Rules; I will therefore treat his application as a petition duly filed under rule 10 of the Mutunga Rules.

That the petitioner was sued by the respondent in the Co-operative Tribunal is not in doubt; it is also not in doubt that the respondent obtained judgment against him and sought to execute the decree thereof in those proceedings. It is apparent the proceedings in the Co-operative Tribunal were taken under the provisions of the **Co-operative Societies Act (Cap 490)** and in particular **Part XV** which deals with settlement of disputes.

Section 81(1) of that Act says that a party who is aggrieved with any order of the Tribunal has the discretion of appealing against that order to the High Court. For better understanding, it necessary to reproduce it here:-

81. Appeal to High Court

(1) Any party to the proceedings before the Tribunal who is aggrieved by any order of the Tribunal may, within thirty days of such order, appeal against such order to the High Court:

Provided that the High Court may, where it is satisfied that there is sufficient reason for so doing, extend the said period of thirty days upon such conditions, if any, as it may think fit.

Although **section 81(1)** talks of an "order" I suppose this word is not used here in its technical sense as we know it and would necessarily include a decree; this would then imply that it is not just any person who is dissatisfied with a ruling and order who may move to the High Court but a person who is equally dissatisfied with a judgment and decree may also appeal against such judgment or decree in the High Court. Nowhere is it expressly stated or implied in the Act that a judgment or decree issued by the Tribunal is final and I would opine that in the absence of such express or implied provision, it is assumed that a decree just like an order is appealable under **section 81(1)** of the **Act**.

Indeed, I gather from the ruling delivered on 29th January, 2009 **in Nyeri High Court Civil Appeal No. 74 of 2008** that the petitioner, took advantage of this provision and appealed to this Honourable Court against the judgment and decree issued by the Tribunal in Co-operative Tribunal Case No. 209 of 2006. The fate of that appeal is not clear but it is sufficient for purposes of determination of this petition that an appeal was filed against the decree whose execution is the subject of interrogation in this petition.

It is also important to note that the appellant did not just appeal against the Tribunal's decree but that he also applied for stay of execution of that decree; his application was, however, dismissed with costs to the respondent.

Having appealed against the decree as provided for under **section 81(1) of the Co-operative Societies Act**, and more so having had his application for stay of execution of that decree rejected, is it open to the petitioner to challenge the execution of the same decree on the basis that his fundamental rights and freedom are being infringed or are threatened with infringement? I reckon not, firstly, because where a particular procedure has expressly been stated, that procedure must followed and in the instant case, it appears to have been followed only that its success is in doubt. In **Methodist Church in Kenya Trustees & Another versus Rev. Jeremiah Muku & Another (2012) eKLR**, the Court of Appeal, after citing several decisions on this issue, came to the conclusion that ordinary errors made in the course of adjudication by the courts should be cured by invoking the mechanism and procedures prescribed by the ordinary law for correction of errors such as appeal or review. Secondly, the invocation of the provisions of the Constitution to allege breach of constitutional rights in addition or as an alternative to laid down procedure of seeking a particular remedy is in my view frivolous, vexatious and an abuse of this Court's process. Lord Diplock made reference to this sort of proceedings in his pronouncement in **Harrikson versus Attorney General of Trinidad & Tobago (1980) AC 265** where he said:-

The notion that whenever there is failure by an organ of government or public authority or public officer to comply with the law this entails contravention of some human right or fundamental freedom guaranteed to individuals by the chapter 1 of the Constitution is fallacious. The right to apply to the High Court under section 6 of the Constitution for redress when any human right or fundamental freedom is or is likely to be contravened, is an important safeguard of those rights and freedoms; but its value will be diminished if it is allowed to be misused as a general substitute for the normal procedures for invoking judicial control of administrative action. In an originating application to the High Court under section 6 (1), the mere allegation that a human right fundamental freedom of the applicant has been or is likely to be contravened is not of itself sufficient to entitle the applicant to invoke the jurisdiction of the court under the subsection if it is apparent that the allegation is frivolous or vexatious or an abuse of the process of the court as being made solely for the purpose of avoiding the necessity of applying in the normal way for the appropriate judicial remedy for the unlawful administrative action which involves no contravention of any human right or fundamental freedom.

Here there is no evidence that an organ of government or public authority has failed to comply with the law as to make out a case for the petitioner that his human right or fundamental freedom has been contravened. His is what the learned judge must have had in mind when he talked of "*the mere allegation that a human right or fundamental freedom has been or is likely to be contravened*". And being only a mere allegation, the petitioner is not entitled to invoke the jurisdiction of this Court under **article 22** of the **Constitution**.

Closer to the point, the petitioner's allegation is, for reasons I have stated, frivolous, vexatious and an abuse of the due process of the Court. Had he not filed an appeal against the judgment and the decree of the Tribunal, I would have added, as the learned judge did in the ***Harrikson case***, that the petition was made solely for the purpose of avoiding the necessity of appealing in the normal way for the appropriate judicial remedy against what he thinks is an erroneous decree. Now that he appealed against the decree, there is no reason why he should be invoking the jurisdiction of this court to declare the execution of the decree as being in contravention of his rights through a separate process. He is in no better position than one who invokes the jurisdiction of this Court under **article 22** of the **Constitution** to avoid applying the appropriate judicial remedy in the normal manner.

In the **Methodist Church in Kenya Trustees & Another versus Rev. Jeremiah Muku & Another** case (supra) a preliminary decree was given in the normal proceedings, more or less like in the instant case. Again, just as in this case, several applications were made to set aside the preliminary decree. An appeal was even contemplated though not pursued. In this case there is evidence that it was filed. While upholding the Superior Courts decision to dismiss the petitioner's constitutional petition, the Court of Appeal held that that the petition was frivolous and was a collateral attack of the preliminary decree through a constitutional petition; it held that this was a gross abuse of the process of the court.

It must also be understood that under **article 169(1) (d)** of the Constitution, the Co-operative Tribunal is acknowledged as part of the system of courts that are subordinate to the High Court; following this particular constitutional provision, it is established under **section 77** of the **Co-operative Societies Act.** The constitutionality of the Tribunal therefore should not be an issue though the petitioner thought otherwise; he did not, however, demonstrate how unconstitutional the Tribunal is.

It is to be noted also that an award of the Tribunal is enforceable just like a court decree; this is clear from section **79 (3)** of the **Co-operative Societies Act** which states:-

> ***79. Award of Tribunal***
>
> ***(1)…***
>
> ***(2)…***
>
> ***(3)Where the Tribunal enters judgment in terms of the award together with costs, it shall issue a decree which shall be enforceable as a decree of a court.***
>
> ***(4)…***
>
> ***(5)…***

One of the means through which the law provides for enforcement of a court decree is by arrest and detention in prison of a judgement debtor; this is catered for under **Order 22 Rules 31** to **33** of the **Civil Procedure Rules** and it is the course that the respondent took to have the decree in his favour enforced. The petitioner has not demonstrated how **section 79** of the **Co-operative Societies Act** or **Order 22** of the **Civil Procedure Rules** are unconstitutional.

The petitioner himself has acknowledged this process of execution; this is because when he was arrested and remanded in prison in execution of the decree, a consent was entered on his behalf in which he agreed to pay the sum of Kshs 750,000/= and pay the balance by way of monthly instalments of Kshs 100,000/=

till payment in full. He was released upon payment of the deposit of Kshs 750,000/= but rather than pay the balance as agreed, he opted to question the same process upon which he partly settled the decretal sum and agreed to pay the balance. How then, one may ask, can he claim that his fundamental rights have been breached in such circumstances?

Our Constitution may arguably be one of the most liberal in this part of the world but it is certainly not a licence for any person to evade his legal obligations towards other people. The petitioner cannot be heard to argue that his right to liberty has been violated or is threatened with such violation simply because a valid court decree is being executed against him; the respondent is entitled to the fruits of its judgment as much as the petitioner is entitled to his liberty.

For the reasons I have given I am not satisfied that the petitioner's petition is merited. It is in the least, made in bad faith; it is also vexatious, frivolous and an abuse of the due process of the Court. It is hereby dismissed with costs.

Signed, dated and delivered in open court this 18th day of March, 2016

Ngaah Jairus

JUDGE